72-1044

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Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 72-1044

JOHNSON BONDING COMPANY, INC.
JAMES C. JOHNSON, JR. and
LEROY HAYDEN - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

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Petitioners a stay in which to file their application for a Writ of Certiorari was entered on December 1, 1972, and is attached hereto.

1(b)

The judgment of the Court of Appeals of Kentucky was entered on November 3, 1972, it is final by its terms.

No rehearing was requested and the Court of Appeals on December 1, 1972, granted the Petitioners ninety (90) days in which to apply to this Court for a Writ of Certiorari. The jurisdiction of this Court is invoked under the provisions of Title 28, USC, Section 1257(3).

1(c)

KRS 304.34-080(1)(g) provides that no bail bondsman shall "suggest or advise the employment of any particular attorney to represent the principal." Two indictments were returned by the McCracken Circuit Court charging James C. Johnson, Jr., with three specific offenses of suggesting the name of a particular attorney, and Leroy Hayden with three charges also of suggesting a particular attorney for the principal. Johnson Bonding Company, Inc., was charged with six counts of suggesting or advising the employment of a particular attorney to represent the principal. The Petitioners filed a motion to dismiss in the McCracken Circuit Court which was sustained. The Petitioners contended that the Kentucky Statute KRS 304.34-080 (1)(g) violated the First and Fourteenth Amendments of the United States Constitution. The questions are:

(1) Is Subsection G of the Statute overbroad, indefinite and vague?

(2) Does the speech and acts prohibited by the Statute fail to create a clear and present danger or a serious imminent threat to the administration justice?

(3) Does the Statute seek to protect sound ethical standards required of lawyers for the protection of the public interest?

(4) Is the Statute a reasonable exercise of the Police Power by the Commonwealth of Kentucky?

1(d)

KRS 304.34-080(1)(g) provides that no bail bondsmen shall: "suggest or advise the employment of any particular attorney to represent the principal."

The First Amendment of the United States Constitution provides:

> "Congress shall make no laws * * * abridging the freedom of speech."

The Fourteenth Amendment of the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1(e)

On January 17, 1972, the Grand Jury of McCracken County, Kentucky, returned indictments against Johnson Bonding Company, Inc. charging it with 6 viola-

tions of KRS 304.34-080(1)(g); charging James C. Johnson, Jr. in three counts with violation of the same Statute, and Leroy Hayden was also charged in three counts with violating the same Statute. The six counts charged against Johnson Bonding Company, Inc. are the same counts charged against its agent, James C. Johnson, Jr. and Leroy Hayden. The Petitioners filed motions to dismiss each of these counts in the indictment alleging that the Statute violated the First and Fourteenth Amendments of the United States Constitution and Sections of the Kentucky Constitution (Page 30, of the opinion of the McCracken Circuit Court, Page 36, Order of McCracken Circuit Court dismissing the indictments, filed and entered February 23, 1972). The McCracken Circuit Court in an opinion and judgment rendered and entered on February 23, 1972, sustained the Petitioners' motions to dismiss on the grounds that the Statute by its provisions violated the First and Fourteenth Amendments of the Constitution of the United States and Bill of Rights of the Commonwealth of Kentucky. The Commonwealth appealed under KRS 21.140(3) for a certification of the law (Page 2 of the opinion of the Court of Appeals rendered November 3, 1972). The Court of Appeals of Kentucky held that the Statute KRS 304.34-080(1)(g) was valid and did not violate the First and Fourteenth Amendments of the United States Constitution (Page 4 of the opinion of the Court of Appeals). The Petitioners applied to the Court of Appeals of Kentucky for an order staying the issuance of the mandate for

a period of ninety (90) days. The order of the Court of Appeals, which is attached granting this motion, was entered on December 1, 1972.

1(h)

This case is important to the Petitioners in that James C. Johnson, Jr. and Leroy Hayden, upon conviction, are guilty of a misdemeanor with a fine up to $500.00 and six months in jail. Upon conviction, there is an automatic revocation of their license, and the license of Johnson Bonding Company, Inc., to carry on the bail bonding business in Kentucky. KRS 304.34-100. The substantive evils which the Statute seeks to prevent are a splitting of fees between an attorney and a bondsman, and also to prevent an attorney from having a bondsman solicit business for him. The Kentucky Court of Appeals at page 3 of its opinion, stated that the State Government had an important and substantial interest in the regulation of the legal profession and he protection of the public from the evils of solicitation of business and referral agreements. Likewise, it said the State had an important and substantial interest in the regulation of the bail bonding business, which has features making it a peculiar and appropriate subject for Police Power regulations. The Petitioners contend that the Statute prohibits acts which fail to create a clear and present danger or a serious and imminent threat to the administration of justice and is overbroad and indefinite and vague.

The word suggest, as defined in Webster's Dictionary, means to bring, for instance, a thought, etc., to the

mind for consideration; to call to mind through association of ideas; to propose someone or something as a possibility; to show indirectly; imply; intimate. In order for a bondsman to steer a clear path around Subsection (g), he would have to keep his mouth shut at all times, not be afflicted with a disease causing an excessive blinking of his eyelids, or palsy, whereby the inadvertent nod of his head, or the blink of an eyelid would note a suggestion to any question by an accused person as to whether "John Smith was a good attorney." If he did so, this would be a violation of the Statute. Subsection (g), does not define or restrict the offense to merely suggesting the employment of a particular attorney to represent the principal on the charge for which bond was made. A reading of Subsection (g) will show that under it, a bondsman would be guilty if he suggested an attorney to represent the principal on a charge that was pending against him in another county, or even another state. Subsection (g) would prohibit a bondsman from suggesting the name of an attorney to represent his principal in some civil matter about which the principal inquired. A principal may already have a lawyer to represent him on the criminal charge wherein the bond was executed, and at the same time ask of a bondsman if he knows of a good attorney to represent the principal in a domestic case or personal injury claim he has, and the bondsman would be liable under this Statute.

Furthermore, bondsmen are human beings and have families. If a close member of a bondsman's immediate family became a principal on any minor charge, then

the bondsman could not even suggest the name of an attorney to represent this member of his family on the criminal charge.

Under Subsection (g) if a bondsman suggested the employment of as many as two attorneys to the principal, there would not be a violation of the Statute. If a bondsman made 6 bonds in one day and recommended the same 6 attorneys to each of the 6 principals, there would be no violation. However, if the bondsman suggested the name of a different attorney to each of the 6 principals, he would be guilty of violating this Statute. Consider the situation in which a bondsman is placed when he has obtained the release of the principal and he and the principal are walking down the corridor to leave the jail, an attorney passes by and the bondsman speaks to him. The principal, thinking he knows the attorney but not being able to recall his name, asks the bondsman who he was. The bondsman replies, "John Smith, and he is a good lawyer." The bondsman has violated this Statute.

In the case of Chase v. Robson, U. S. District Court Judge, 435 Fed. 2d 1059, some 4 defendants were charged with destroying selective service records. The Court, at a pre-trial hearing, entered an order ordering that counsel for both the government and the defendants, and the defendants themselves, were not to make any statement, oral or written, for public reporting or dissemination in any fashion regarding the jurors the evidence, rulings or anything connected with the case. On Appeal, the Court held that before a trial court can limit the defendants' and their attorneys' exercise of

First Amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court, establishing that the defendants' and their attorneys' conduct is a serious and imminent threat to the administration of justice. The Court held, when applying the standard that the speech which is prohibited, it must create a clear and present danger of a serious and imminent threat to the administration of justice. The Court found the order to be constitutionally impermissible and it constituted a prior restraint on First Amendment freedoms. In the case of Overstock Book Company v. Barry, 305 Fed. Supp. 842, it was held that overbreadth is a term used to describe a situation where a statute prescribes not only what may constitutionally be proscribed, but also forbids conduct which is protected by the First Amendment. The statute in question before the Court now is not narrowly drawn and it prohibits speech protected by the First Amendment. In Bridges v. California, 314 U. S. 252, 86 L. Ed. 192, the Supreme Court stated that it is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be proscribed. In the latest case, New York Times Company v. United States, 29 L. Ed. 2d 822, the Court said that any system of prior restraints of expression comes to the United States Supreme Court bearing a heavy presumption against its constitutional validity, and a party who seeks to have such a restraint upheld, carries a heavy burden of showing justification for the imposition of such a restraint. See National Association of Letter Carriers v. Blount, 305 Fed.

Supp. 546, wherein the Court held that Section 7311(3) of Title 5, United States Code was unconstitutional.

The evils which Subsection (g) sought to prevent were any agreement between a bondsman and an attorney, whereby the bondsman would solicit cases for a particular attorney, and fee splitting or rebate among a bondsman and an attorney. The Kentucky Bail Bonding Act provides a remedy for these practices. KRS 304.34-080(1)(b), prohibits a bondsman from paying a fee or rebate or give anything of value to an attorney in bail bonding matters, and Subsection (2) of the same Statute, provides that an attorney at law shall not be a bail bondsman and shall not directly or indirectly receive any benefits from the execution of any bail bond. The Statute has adequate provisions to protect the public and the legal profession from these evils. Furthermore, the Court of Appeals of Kentucky, can disbar a lawyer for these violations. Since the Statute contains an adequate remedy, the prohibition against suggesting a particular attorney is overbroad and does not present a clear and present danger to the administration of justice.

This Court has passed on the question where union members or minority groups refer their members to a particular attorney. United Mine Workers of America v. Illinois State Bar Association, 389 U. S. 217, 19 Lawyers Edition, 426; United Transportation Union v. State Bar of Michigan, 28 Lawyers Edition 2d 339; Brotherhood of Railroad Trainmen v. Virginia, 377 U. S. 1, 12 Lawyers Edition 2d 89; National Association for Advancement of Colored People v. Robert Y. Button, Attorney General, 371 U. S. 415, 9 Lawyers

Edition 2d 405. The Court of Appeals of Kentucky at Page 3 of their opinion distinguished these cases since the Union and minority groups had an interest which was sufficient to be protected by the United States Constitution. It is submitted that the bondsman and the accused person in jail has a sufficient interest which should be protected by the First and Fourteenth Amendments of the United States Constitution. The bondsman has been recognized throughout the law as the custodian of his principal. Every person accused of a crime is entitled to the services of an attorney. The American Bar Association has recognized the difficulty of transients, persons moving in new areas, persons of limited educational means in securing the services of an attorney. As long as there isn't any arrangement or any acts giving rise to any arrangement between an attorney and a bondsman, there should be no prohibition against the suggestion of an attorney to an accused who is already in jail. As long as there is no fee splitting or rebates, the recommendation of an attorney should not be a violation of the criminal laws. The Statute does not take into account that an accused, who is in jail, more likely than not, thinks that the prosecuting attorney, the judge and all members of government are not only trying to put him in jail, but to keep him there. In a great many instances the only person the accused has to turn to is his bondsman.

The Petitioners have been unable to find any case wherein the Federal Questions herein presented, have been specifically determined by this Court.

WHEREFORE, the Petitioners request the Court that a Writ of Certiorari be issued to the Kentucky Court of Appeals reversing their decision in this case.

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McCRACKEN CIRCUIT COURT

Division No. I

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v. Indictment No. 11,126

LEROY HAYDEN,
JOHNSON BONDING COMPANY, INC. - - *Defendants*

AND

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v. Indictment No. 11,127

JAMES C. JOHNSON,
JOHNSON BONDING COMPANY, INC. - - *Defendants*

RULING AND OPINION OF THE COURT

On January 17, 1972, the Grand Jury of McCracken County, Kentucky, by Indictment 11,126 indicted the defendant, Leroy Hayden, in Counts 1 through 3 charging violation of KRS 304.34-080(1)(g). The defendant, Johnson Bonding Company, Inc., is charged in Counts 4 through 6 with violation of the same section and concerning the same persons.

At the same time and on January 17, 1972, the Grand Jury indicted the defendant, James C. Johnson, and the defendant, Johnson Bonding Company, Inc., by Indictment 11,127 alleging the defendant Johnson violated the same Statute number above referred to in Counts 4 through 6. Counts 10 through 12 allege a violation on the part of the defendant Company of the above section number. In this Indictment the defendant Johnson is also charged with vio-

lation of KRS 304.34-080(1)(e) in Counts 1 through 3. The defendant Company is charged with violation of KRS 304.34-080(1)(e) in Counts 7 through 9. The charges based on subsection (e) in substance alleges defendants accepted an amount in excess of the premium for the bond.

The defendants have filed a motion to dismiss each of the indictments, and raise the question as to the constitutionality of subsection (g) above mentioned, which we will first discuss.

The counts of the indictment alleging violation of subsection (g) above mentioned, which we will first discuss.

The counts of the indictment alleging violation of subsection (g) naming the particular defendant and person involved state:

> "The above named defendant, _____, unlawfully suggested and advised _____ to employ a particular attorney to represent him on a criminal charge pending in the Police Court of the City of Paducah, Kentucky, and defendant and _____ being at the time a bail bondsman and principal respectively on a bail bond executed in connection with a criminal charge, against the peace and dignity of the Commonwealth of Kentucky."

That part pertaining to the question under consideration of Kentucky Revised Statute 304.34-080 referring to actions prohibited to bondsmen provides as follows:

> "Subsection (1). No bail bondsman shall;
> "Subsection (g). Suggest or advise the employment of any particular attorney to represent the principal."

The above section is a part of Sub-Title 34 titled "Bail Bondsmen" of KRS 304 and was enacted by the General Assembly of Kentucky at its session in 1970 and became effective June 18, 1970. We know of no other alleged violations within

this State of this section of the Statute since its enactment, and presume that this is the first occasion in which its constitutionality has been questioned. The defendants contend that subsection (g) is unconstitutional in that it prohibits the freedom of speech, the freedom of expression of opinions, and the freedom of thoughts. It is the position of the defendants that subsection (g) violates the First Amendment of the Constitution of the United States, which states:

> "Congress shall make no laws * * * abridging the freedom of speech."

That it violates the Fourteenth Amendment of the Constitution of the United States, which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Further, that it is in violation of the Bill of Rights of the Commonwealth of Kentucky, which provides:

> "1. All men are by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
>
> "4. The right of freely communicating their thoughts and opinions:
>
> "8. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

This question while apparently new as it relates to the bail bondsman act is not a new question. The State of Virginia passed a Statute in which it proscribed criminal penal-

ties for advising another that his legal rights had been infringed and referring him to a particular attorney, or a group of attorneys for assistance. The Supreme Court of the United States considered the question just mentiond in the case of National Association for the Advancement of Colored People vs. Robert Y. Button, Attorney General, 371 U. S. 415, 9 L. Ed. 2d 405. The Court stated:

> "We conclude that under Chapter 33, as authoritatively construed by the Supreme Court of Appeals, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys (for example, to the Virginia Conference's legal staff) for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances."

The Supreme Court in declaring the Virginia Act unconstitutional stated in substance that it violates the First and Fourteenth Amendment of the Constitution of the United States, and Mr. Justice White states as follows:

> "I agree that as construed by the Virginia Supreme Court, Chapter 33 does not proscribe only the actual control of litigation after its commencement, that it does forbid, under threat of criminal punishment, advising the employment of particular attorneys, and that as so construed the statute is unconstitutional."

Other cases cited, the Supreme Court takes the same position as in the People vs. Button.

It is, therefore, our opinion that subsection (g) making it a penalty for the bail bondsman to "suggest or advise the employment of any particular attorney to represent the principal" constitutes a prior restraint on the freedoms of the First Amendment of the United States Constitution, and that it is vague and indefinite and in fact violates both the

First and Fourteenth Amendment of the United States Constitution, as well as the Bill of Rights of the Commonwealth of Kentucky, and that subsection (g) is unconstitutional.

Counts 1, 2 and 3 of Indictment 11,127 charges violation of KRS 304.34-080(1)(e). The indictment recites "and said amount being more than the premium on the bond." Subsection (e) of the Statute states as follows:

> "(1) No bail bondsman shall:
>
> "(e) Accept anything of value from the principal except the premium, *provided that the bondsman shall be permitted to accept collateral security* which shall be returned upon payment of the premium on the bond or their indemnity which shall be returned upon either final termination of liability on the bond or the posting of other accepted collateral. Such collateral security or other indemnity required by the bondsman must be reasonable in relation to the amount of the bond;"

In response to Counts 1 and 7 the defendant has filed as Exhibit 1 certified copies of the records of the Paducah Police Court showing the application for the bond by Charles Hays, a copy of the receipt for the premium paid by Charles Hays, a copy of the receipt of money held as collateral security and a collateral security affidavit.

In response to Counts 2 and 8 in connection with Marion C. Benefield, the defendants have filed as Exhibit 2 a certified copy of the following court records: Application for bail, receipt for premium paid, a receipt for money paid as collateral security and collateral security affidavit.

In response to Counts 3 and 9 in regard to Porter Hammond the defendants have filed as Exhibit 3 the following certified records of the Police Court: Application for bail, receipt of premium paid, photostatic copy of deed of conveyance which stamps indicate sale price of $3500.00. It

appears from the record that this was a sale for valuable consideration.

Not any of the Counts of the Indictment 11,127 state that the amounts received by the defendants were not collateral security. This subsection (e) which we have heretofore read, and under which these counts of the indictment rests provides that the bondsman "shall be permitted to accept collateral security which shall be returned upon payment of the premium on the bond or their indemnity which shall be returned upon either final termination of liability on the bond or the posting of other accepted collateral. The records attached and filed as Exhibits were all certified as true and correct records of the Paducah Police Court and the deed was certified as being true and correct by the Clerk of the McCracken County Court.

The Commonwealth made no denial of their correctness or validity in the Response filed by the Commonwealth.

It is our opinion that Counts 1, 2, 3, 7, 8 and 9 were not based upon all the records, and that they do not constitute an offense as drafted and that said counts did not set out that the amounts alleged to have been received were not collateral security, and said counts were, therefore, defective and that each should be dismissed.

The Court will enter an order sustaining the defendants' motion to dismiss each of the indictments.

This 23rd day of February, 1972.

(s) J. Brandon Price, *Judge*
McCracken Circuit Court
Division No. II

Endorsed:
Filed Feb. 23, 1972
S/Alfred Obermark, Clerk

McCRACKEN CIRCUIT COURT

Division No. I

Indictment No. 11,126

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

LEROY HAYDEN,
JOHNSON BONDING COMPANY, INC. - - *Defendants*

ORDER

The defendants have filed a Motion to Dismiss the indictment, and same having come on for a hearing before the Court, and it appearing to the Court that Kentucky Revised Statute 304.34-080(1)(g) in which it is stated no bail bondsman shall "suggest or advise the employment of any particular attorney to represent the principal" is in fact a violation of both the First Amendment of the Constitution of the United States and the Fourteenth Amendment of the Constitution of the United States and same is a violation of the Bill of Rights of the Commonwealth of Kentucky, and that said section of the Statutes is in fact unconstitutional as more specifically set out at length in the written opinion of the Court,

It is ordered that defendants' Motion to Dismiss be sustained and said indictment is dismissed.

This 23rd day of February, 1972.

(s) J. BRANDON PRICE, *Judge*
McCracken Circuit Court
Division No. II

Endorsed:
Received and filed Feb. 23, 1972
Alfred Obermark, Clerk
By S/Lena Gleaves, D.C.

COURT OF APPEALS OF KENTUCKY

Rendered: November 3, 1972
File No. W-305-72 and No. W-310-72

COMMONWEALTH OF KENTUCKY - - - *Appellant*

v.

LEROY HAYDEN and
JOHNSON BONDING COMPANY, INC. - - *Appellees*

AND

COMMONWEALTH OF KENTUCKY - - - *Appellant*

v.

JAMES C. JOHNSON and
JOHNSON BONDING COMPANY, INC. - - *Appellees*

Consolidated Appeals from McCracken Circuit Court
Honorable Brandon Price, Judge

OPINION OF THE COURT BY COMMISSIONER CULLEN—CERTIFYING THE LAW

James C. Johnson and his employer, Johnson Bonding Company, were indicated on three counts of accepting money for a bail bond in excess of the premium for the bond, in violation of KRS 304.34-080(1)(e), and on three counts of suggesting to and advising a person for whom a bail bond was written that he employ a particular attorney to represent him, in violation of KRS 304.34-080(1)(g). Leroy Hayden and his employer, Johnson Bonding Company, were indicted on three counts of suggesting to and advising a

person for whom a bail bond was written that he employ a particular attorney to represent him, in violation of KRS 304.34-080(1)(g). Each of the charged offenses was punishable, under KRS 304.99-030, by a fine of not more than $500 or imprisonment in the county jail for not more than six months, or both.

The circuit court dismissed the indictments and the Commonwealth has appealed under KRS 21.140(3) for a certification of the law.

The ground on which the circuit court dismissed the indictment as to the charges of suggesting or advising employment of a particular attorney, in violation of KRS 304.34-080(1)(g), was that the statute is unconstitutional, being in "violation of both the First Amendment • • • and the Fourteenth Amendment of the Constitution of the United States and • • • of the Bill of Rights of the Commonwealth of Kentucky."

The ground on which the indictment was dismissed as to the charges of accepting money for a bail bond in excess of the premium was that the counts "were not based upon the complete records and do not constitute an offense as drafted, and • • • fail to set forth that the amounts alleged to have been received were not collateral security as allowed by" KRS 304.34-080(1)(e).

We shall consider first the question of constitutionality of the provision of KRS 304.34-080(1)(g) that no bail bondsman shall "Suggest or advise the employment of any particular attorney to represent the principal."

As stated in Colten v. Commonwealth, Ky., 467 S. W. 2d 374, aff. ____ U. S. ____, 32 L. Ed 2d 584, ____ S. Ct. ____, the government's "important or substantial governmental interest" which must exist as a basis for regulation under the police power in the area of First Amendment freedoms, is relative to the importance or substantiality of the particular purported exercise of one of those freedoms.

The state government has an important and substantial interest in the regulation of the legal profession and the protection of the public from the evils of solicitation of business and referral agreements. Likewise the state has an important and substantial interest in the regulation of the bail-bond business, which has features making it peculiarly an appropriate subject for police-power regulations. See Jackson v. Beavers, 156 Ga. 71, 118 S. E. 751.

There is no showing, however, of any important and substantial interest on the part of a bail bondsman in the suggesting or recommending of the employment of an attorney. Therefore, in the balance of interests, the government's interest is overwhelming, and justifies the regulation in question.

The trial court's reliance on N.A.A.C.P. v. Button, 371 U. S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328, is, we think, misplaced. The holding there simply was that the N.A.A.C.P. had such an important and substantial interest in the recommending and employing of counsel for Negroes as to outweigh the state's interest in regulating the legal profession, the interest of the N.A.A.C.P. being to associate for the advancement of beliefs and ideas, and their activity being a form of political expression. The Supreme Court expressly recognized, in *Button*, that a compelling state interest in the regulation of a subject within a state's constitutional power to regulate can justify limiting First Amendment freedoms. In *Button* the state's interest did not weigh enough in the balance. In the instant case it does.

For the same reason, this case is not controlled by the labor union cases: Brotherhood of Railroad Trainmen v. Virginia, 377 U. S. 1, 12 L. Ed. 2d 89; United Mine Workers of America v. Illinois State Bar Association, 389 U. S. 217, 19 L. Ed. 2d 426; and State Bar of Michigan v. Brotherhood of Railroad Trainmen, 374 Mich. 152, 132 N. W. 2d 78. Those cases held only that the unions had an important and

substantial interest in the procuring of legal representation for their members, which outweighed the state's regulatory interest.

We find nothing overbroad or vague in the statute in question. Its plain, narrow meaning is that a bail bondsman shall not suggest or advise, to the principal for whom he executes a bail bond, that the principal employ a particular attorney to represent him in the criminal case in which the bail bond is executed.

It is our conclusion that the statute in question is valid.

We come now to the sufficiency of the indictments as relates to the charges of accepting money in excess of the premiums for the bail bonds. The statute, KRS 304.34-080 (1)(e), following its prohibition against accepting anything of value from the principal except the premium, sets forth two exceptions introduced by the words, "provided that." One of the exceptions is the acceptance of collateral security. The circuit court held the indictments insufficient for failure to "set forth that the amounts received were not collateral security as allowed by" the statute. In this holding the circuit court was in error, since under RCr 6.10 an indictment need not negative any exception, excuse or proviso contained in the statute creating or defining the offense charged.

The circuit court, in dismissing the indictment as to the excess-money charges, mentioned the fact that the defendants had filed, with their motions to dismiss, some documentary evidence that the amounts they were charged with having taken in excess of the premiums eitehr constituted deposits of collateral or were received in independent business transactions not related to the bail bonds, and the court stated in its order of dismissal that the indictments "were not based upon the complete records." In considering this evidence the court in effect adopted a summary judgment theory. There is no authority for the use of summary judg-

ment procedure in a criminal prosecution, and it is our opinion that the evidence could not properly be considered on the motions to dismiss.

The law is certified as set forth in this opinion.

All concur.

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COURT OF APPEALS OF KENTUCKY

File No. W-305-72 and No. W-310-72

COMMONWEALTH OF KENTUCKY - - - *Appellant*

v.

LEROY HAYDEN and
JOHNSON BONDING COMPANY, INC. - - *Appellees*

AND

COMMONWEALTH OF KENTUCKY - - - *Appellant*

v.

JAMES C. JOHNSON and
JOHNSON BONDING COMPANY, INC. - - *Appellees*

ORDER

The Appellees having filed their motion for a stay of issuance of the mandate, and the motion having been considered,

It Is Hereby Ordered that the Clerk of this Court shall not issue the mandate in this case for a period of ninety (90) days from the date of this Order, in order that the Appellees may apply to the United States Supreme Court for a Writ of Certiorari.

(s) EARL OSBORNE, *Judge*

Entered December 1, 1972

FILE COPY

FILED
FEB 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-1044

JOHNSON BONDING COMPANY, INC.
JAMES C. JOHNSON, JR. and
LEROY HAYDEN ..... Petitioners

VS.

COMMONWEALTH
OF KENTUCKY ..... Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
COMMONWEALTH OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-1044

JOHNSON BONDING COMPANY, INC.
JAMES C. JOHNSON, JR. and
LEROY HAYDEN ..... Petitioners

VS.

COMMONWEALTH
OF KENTUCKY ..... Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
COMMONWEALTH OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below, from the Court of Appeals of the Commonwealth of Kentucky, styled *Commonwealth of Kentucky* v. *Leroy Hayden, Johnson Bonding Co., Inc.*

is unpublished. Therefore, a copy is attached to this brief as Appendix I and made a part thereof. The opinion of the McCracken Circuit Court, also unreported, is attached to the petitioner's brief.

JURISDICTION

The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1257 (3) which is the proper provision for review of a state court decision.

QUESTIONS PRESENTED

I. **IS KRS 304.34-080 (1) (g) OVERBROAD, INDEFINITE, AND VAGUE?**

II. **DOES THE STATUTE ABRIDGE THE FREEDOM OF SPEECH OF THE PETITIONERS IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?**

III. **DOES THE STATUTE SEEK TO PROTECT SOUND ETHICAL STANDARDS REQUIRED OF LAWYERS FOR THE PROTECTION OF THE PUBLIC INTEREST?**

IV. **IS THE STATUTE A REASONABLE EXERCISE OF THE POLICE POWER BY THE COMMONWEALTH OF KENTUCKY?**

STATEMENT OF THE CASE

On January 17, 1972, the McCracken County Grand Jury returned separate indictments against the Johnson Bonding Company, Inc., James C. Johnson, Jr., and Leroy Hayden, charging, inter alia, numerous

violations of KRS 304.34-080 (1) (g) which provides that no bail bondsman shall:

> "Suggest or advise the employment of any particular attorney to represent the principal."

Shortly after the indictments were returned, the defendants, by counsel, moved to dismiss the indictments on the grounds that KRS 304.34-080 (1) (g) was unconstitutional.

The McCracken Circuit Court, on February 23, 1972, entered an order sustaining the defendant's motion. The Court held that the provision in question constituted an impermissible prior restraint on the First Amendment freedoms of speech and expression, and, moreover, that this provision was vague and indefinite in violation of the First and Fourteenth Amendments to the United States Constitution.

The respondent then sought a Certification of the Law from the Court of Appeals of Kentucky. The Court of Appeals held that KRS 304.34-080 (1) (g) was constitutional and a valid and reasonable exercise of the Commonwealth's police power. The petitioner now seeks a writ of certiorari to the Court of Appeals of Kentucky.

ARGUMENT

I. KRS 304.34-080 (1) (g) IS NOT OVERBROAD, INDEFINITE, OR VAGUE.

In support of their allegation that the above statute is overbroad, indefinite, and vague, the petitioners have

resorted to mental gymnastics that would confuse Noah Webster himself. By twisting and distorting the plain and simple meaning of words familiar to even the most uneducated person, the petitioners have created a semantical swamp into which the respondent will not venture. KRS 304.34-080 (1) (g) is worded simply and concisely. There can be no doubt as to its meaning. This question was succinctly disposed of by the Court of Appeals in the case below (Appendix, p. 5a):

> "We find nothing overbroad or vague in the statute in question. Its plain, narrow meaning is that a bail bondsman shall not suggest or advise, to the principal for whom he executes a bail bond, that the principal employ a particular attorney to represent him in the criminal case in which the bail bond is executed."

II. THIS STATUTE DOES NOT ABRIDGE THE PETITIONERS' FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

The petitioners argue that to prohibit bail bondsmen from suggesting a particular attorney is a violation of their First and Fourteenth Amendment rights to free speech and expression. In support thereof, petitioners and the McCracken Circuit Court cite *NAACP* v. *Button*, 371 U.S. 415, 9 L.Ed.2d 405 (1962), *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 12 L.Ed. 2d 89 (1964) and numerous other related cases, all of which involved situations where labor unions or minority groups were prosecuted for referring their members to a particular attorney or group of attorneys.

The respondent contends that these cases have no relevance to the case at bar. When this and other courts reversed convictions for referral activities in *Button* and others, it was because the referral situations therein were essential to the advancement of the political beliefs of the groups involved. Moreover, in *Button,* this Court expressly recognized that a compelling state interest in the regulation of a subject can justify limiting First Amendment freedoms.

Hence, it is apparent that while the protective umbrella of *Button* and the other cases relied on by the petitioner is wide enough to protect any lawful political expression or association, it is not so wide as to protect any form of speech by any individual under any circumstances. To equate the objectives of bail bondsmen with those of the NAACP or even the Ku Klux Klan is to libel the entire movement for freedom of political expression. Not even the most naive among us could believe that when a bail bondsman recommends to his principal a particular attorney he is advocating any political objective, unless the preservation and enrichment of bail bondsmen could be considered as such an objective.

This Court has never accepted the proposition that all speech is protected under every circumstance. Moreover, the respondent submits that the actions of a bondsman in suggesting an attorney to his principal is not a form of expression protected by the First and Fourteenth Amendments. Therefore, a statute pro-

scribing that particular conduct is not, ipso facto, unconstitutional.

III. THE STATUTE IS NOT AN ATTEMPT TO REGULATE THE LEGAL PROFESSION FOR THE PROTECTION OF THE PUBLIC INTEREST.

The petitioners have somehow gotten the impression that KRS 304.34-080 (1) (g) was enacted to regulate the legal profession. This conclusion is totally erroneous. The legal profession is scrupulously regulated by the respective bar associations through the medium of the courts. The statute in question was enacted by the Kentucky General Assembly in 1970 for the purpose of regulating the bail bond business.

At this point it must be pointed out that the bail bond business affords peculiar opportunity for fraud and unethical practices. One of the most damaging of these practices is an agreement whereby bondsman and attorney work together, each funneling clients to the other. It is too obvious for argument that such an agreement can only hurt the principal who, at such a time, needs, and is entitled to fair and unbiased legal advice from an attorney who is working solely for the benefit of the principal and not for the bondsman who stands behind the principal.

KRS 304.34-080 (1) (g) was promulgated to prohibit just such an unconscionable agreement by imposing criminal sanctions on any bail bondsman who suggests the employment of any particular attorney. The respondent contends that this provision is neces-

sary to insure that every arrestee is given the opportunity to obtain effective counsel and to prevent a bail bondsman from profiting from the arrestee's need for counsel.

IV. THE STATUTE IS A REASONABLE EXERCISE OF THE COMMONWEALTH'S POLICE POWER.

It has long been accepted that the State has the power to regulate conduct and activities that threaten the peace and well being of the State and its citizens. This is the "police power" of the State. The respondent submits that the regulation of the bail bond business is a valid exercise of the Commonwealth's police power.

That the bail bond business poses a threat to the public welfare and, hence, is subject to regulation under the State's police power has been consistently upheld in all jurisdictions. A cogent explanation of the rationale behind this regulation was laid down by the Supreme Court of Georgia in *Jackson* v. *Beavers,* 156 Ga. 71, 118 S.E. 751 (1923), wherein the court stated:

> "The business of professional bondsmen affords peculiar opportunity for fraud and imposition upon the persons whom they serve. Besides, such business may be so conducted as to seriously interfere with the fair and proper administration of the criminal laws. The unscrupulous may devise means and methods for the escape of violators of the penal statutes. They may use improper and illegal means to secure the acquittal of the clients. For these and other reasons which could be given,

this business comes within the police power of the state."

For other cases holding that the bail bond business is subject to regulation under the State's police power see: *McDonough* v. *Goodcell*, 91 P.2d 1035 (1939); *State ex rel. Howell* v. *Schiele*, 91 N.E. 2d 5 (1949); *Baltimore* v. *Stuyvesant Ins. Co.*, 174 A.2d 153 (1961); *Summit Fidelity and Security Co.* v. *Nimtz*, 64 N.W. 2d 803 (1954); *Doe* v. *O'Brien*, 217 A.2d 189 (1966).

The respondent further contends that KRS 304.34-080 (1) (g) is a *reasonable* exercise of the Commonwealth's police power. Any exercise of the police power necessarily involves a balancing of interests: individual freedoms on one hand, the interest of society in regulating harmful conduct on the other. This proposition was restated in *Colten* v. *Commonwealth*, U.S. , 32 L.Ed. 2d 584, S.Ct. (1972), wherein this Court held that the state's "important or substantial governmental interest" which is the basis for the police power in the area of First Amendment freedoms, must be weighed against the particular exercise of these freedoms that the state is attempting to regulate.

As has been shown, the Commonwealth has a substantial and valid interest in regulating the bail bond business. The petitioners, however, have not shown that the bail bondsman has any important and substantial interest in recommending a particular attorney to his principal. Therefore, the respondent submits that, in the case at bar, the interest of the

State weighs heavier in balance. For that reason, the statute in question is a reasonable exercise of the police power.

CONCLUSION

KRS 304.34-080 (1) (g) is a reasonable and necessary exercise of the Commonwealth's police power. The petitioners have failed to raise any substantial constitutional issue. Therefore, the respondent respectfully requests that the petition be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Carl Miller, counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on February 23, 1973, addressed to counsel for petitioners, Honorable E. W. Rivers, P. O. Box 1407, Avondale Station, Paducah, Kentucky 42001, and Attorneys for Kentucky Bar Association, John J. O'Hara and Leslie J. Whitmer, 243 State Capitol, Frankfort, Kentucky 40601.

Carl Miller

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RENDERER:
November 3, 1972

COURT OF APPEALS OF KENTUCKY

COMMONWEALTH
OF KENTUCKY ..... Appellant

V.

LEROY HAYDEN and JOHNSON
BONDING COMPANY, INC. ..... Appellees

AND

COMMONWEALTH
OF KENTUCKY ..... Appellant

V.

JAMES C. JOHNSON and JOHNSON
BONDING COMPANY, INC. ..... Appellees

CONSOLIDATED APPEALS FROM
McCRACKEN CIRCUIT COURT
HONORABLE BRANDON PRICE, JUDGE

OPINION OF THE COURT
BY COMMISSIONER CULLEN

CERTIFYING THE LAW

James C. Johnson and his employer, Johnson Bonding Company, were indicted on three counts of accepting money for a bail bond in excess of the

premium for the bond, in violation of KRS 304.34-080 (1)(e), and on three counts of suggesting to and advising a person for whom a bail bond was written that he employ a particular attorney to represent him, in violation of KRS 304.34-080(1)(g). Leroy Hayden and his employer, Johnson Bonding Company, were indicted on three counts of suggesting to and advising a person for whom a bail bond was written that he employ a particular attorney to represent him, in violation of KRS 304.34-080(1)(g). Each of the charged offenses was punishable, under KRS 304.99-030, by a fine of not more than $500 or imprisonment in the county jail for not more than six months, or both.

The circuit court dismissed the indictments and the Commonwealth has appealed under KRS 21.140(3) for a certification of the law.

The ground on which the circuit court dismissed the indictment as to the charges of suggesting or advising employment of a particular attorney, in violation of KRS 304.34-080(1)(g), was that the statute is unconstitutional, being in "violation of both the First Amendment * * * and the Fourteenth Amendment of the Constitution of the United States and * * * of the Bill of Rights of the Commonwealth of Kentucky."

The ground on which the indictment was dismissed as to the charges of accepting money for a bail bond in excess of the premium was that the counts "were not based upon the complete records and do not

constitute an offense as drafted, and * * * fail to set forth that the amounts alleged to have been received were not collateral security as allowed by" KRS 304.34-080(1)(e).

We shall consider first the question of constitutionality of the provision of KRS 304.34-080(1)(g) that no bail bondsman shall "Suggest or advise the employment of any particular attorney to represent the principal."

As stated in Colten v. Commonwealth, Ky., 467 S.W. 2d 374, aff. ..... U.S. ..... 32 L. Ed. 2d 584, ... S.Ct. ....., the government's "important or substantial governmental interest" which must exist as a basis for regulation under the police power in the area of First Amendment freedoms, is relative to the importance or substantiality of the particular purported exercise of one of those freedoms.

The state government has an important and substantial interest in the regulation of the legal profession and the protection of the public from the evils of solicitation of business and referral agreements. Likewise the state has an important and substantial interest in the regulation of the bail-bond business, which has features making it pecularily an appropriate subject for police-power regulations. See Jackson v. Beavers, 156 Ga. 71, 118 S.E. 751.

There is no showing, however, of any important and substantial interest on the part of a bail bondsman in the suggesting or recommending of the em-

ployment of an attorney. Therefore, in the balance of interests, the government's interest is overwhelming, and justifies the regulation in question.

The trial court's reliance on N.A.A.C.P. v. Button, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328, is, we think, misplaced. The holding there simply was that the N.A.A.C.P. had such an important and substantial interest in the recommending and employing of counsel for Negroes as to outweigh the state's interest in regulating the legal profession, the interest of the N.A.A.C.P. being to associate for the advancement of beliefs and ideas, and their activity being a form of political expression. The Supreme Court expressly recognized, in *Button*, that a compelling state interest in the regulation of a subject within a state's constitutional power to regulate can justify limiting First Amendment freedoms. In *Button* the state's interest did not weigh enough in the balance. In the instant case it does.

For the same reason, this case is not controlled by the labor union cases: Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 12 L. Ed 2d 89; United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 19 L. Ed 2d 426; and State Bar of Michigan v. Brotherhood of Railroad Trainmen, 374 Mich. 152, 132 N.W. 2d 78. Those cases held only that the unions had an important and substantial interest in the procuring of legal representation for their members, which outweighed the state's regulatory interest.

We find nothing overbroad or vague in the statute in question. Its plain, narrow meaning is that a bail bondsman shall not suggest or advise, to the principal for whom he executes a bail bond, that the principal employ a particular attorney to represent him in the criminal case in which the bail bond is executed.

It is our conclusion that the statute in question is valid.

We come now to the sufficiency of the indictments as relates to the charges of accepting money in excess of the premiums for the bail bonds. The statute, KRS 304.080(1)(e), following its prohibition against accepting anything of value from the principal except the premium, sets forth two exceptions introduced by the words, "provided that." One of the exceptions is the acceptance of collateral security. The circuit court held the indictments insufficient for failure to "set forth that the amounts received were not collateral security as allowed by" the statute. In this holding the circuit court was in error, since under RCr 6.10 an indictment need not negative any exception, excuse or proviso contained in the statute creating or defining the offense charged.

The circuit court, in dismissing the indictment as to the excess-money charges, mentioned the fact that the defendants had filed, with their motions to dismiss, some documentary evidence that the amounts they were charged with having taken in excess of the premiums either constituted deposits of collateral or

were received in independent business transactions not related to the bail bonds, and the court stated in its order of dismissal that the indictments "were not based upon the complete records." In considering this evidence the court in effect adopted a summary judgment theory. There is no authority for the use of summary judgment procedure in a criminal prosecution, and it is our opinion that the evidence could not properly be considered on the motions to dismiss.

The law is certified as set forth in this opinion.

All concur.

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